SUPREME COURT U. S.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. 1392

GERALD RONALD GUTHRIE,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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To the Honorables the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit affirming petitioner's conviction in the United States District Court for the Western District of North Carolina.

OPINIONS BELOW

The opinion and judgment of the United States Court of Appeals for the Fourth Circuit (387 F. 2d 569, R. Vol. II, pp. 13-22, Appendix A); the supplemental opinion and judgment of the United States Court of Appeals for the Fourth Circuit (R. Vol. II, pp. 28-31, Appendix B).

JURISDICTION

On December 5, 1967, the United States Court of Appeals for the Fourth Circuit entered an opinion and judgment affirming, in part, and remanding, in part, petitioner's conviction in the United States District Court for the Western District of North Carolina (387 F. 2d 569, R. Vol. II, pp. 13-22, Appendix A). The supplemental opinion and judgment of the United States Court of Appeals for the Fourth Circuit affirming petitioner's conviction was entered on March 4, 1968 (R. Vol. II, pp. 28-31, Appendix B).

On April 1, 1968, the Chief Justice of the United States entered an order extending the time for filing a petition for writ of certiorari in this cause until May 3, 1968.

The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254(1).

QUESTIONS PRESENTED

Circumstances of the Case

Petitioner was tried and convicted in the United States District Court for the Western District of North Carolina on an indictment (R. Vol. I, p. 13) charging him and a co-defendant with a violation of Section 912 of Title 18 of the United States Code. On Appeal, petitioner questioned the

sufficiency of the indictment to charge an offense under the statute and the sufficiency of the Court's instructions to the jury in stating the essential elements of the offense charged. Petitioner also claimed error in the Court's failure to grant petitioner's motion for a severance and the Court's comments, in its instructions to the jury, on the petitioner's failure to testify and his assumed contentions had he testified. During the pendency of the appeal, it was brought to the attention of the Court that during the trial an FBI agent who had testified for the Government was observed conversing with a juror during a recess in the proceedings.

In an opinion entered on December 4, 1967 (387 F. 2d 569, R. Vol. II, pp. 13-22, Appendix A), the Court of Appeals affirmed petitioner's conviction as to the questions raised on appeal, and remanded the case to the District Court with directions that a full hearing be had as to the aforementioned conversation between a juror and an FBI agent during the trial. A full hearing was had and the Court of Appeals affirmed the finding of the District Court that petitioner was not prejudiced by the conversation in a supplemental opinion and judgment entered on March 4, 1968 (R. Vol. II, pp. 28-31, Appendix B).

The Questions

1. Is "intent to defraud" an essential element of an offense under part (1) of 18 United States Code, Section 912 and, if so, is an indictment which fails to allege such "intent" fatally defective?

2. Is "intent to defraud" an essential element of an offense under part (1) of 18 United States Code, Section 912 and, if so, does the failure of the trial court to give an

instruction as to such element constitute plain error requiring reversal?

3. Was the refusal of the trial judge to grant petitioner's motion for a severance such an abuse of discretion as to constitute plain error requiring reversal?

4. Did the trial judge, in stating what he assumed would be the petitioner's contentions had the petitioner testified, abridge petitioner's constitutional right to remain silent?

5. Does the giving of an instruction having no applicability to the offense charged constitute plain error requiring reversal?

6. Is that portion of 28 United States Code, Section 753 requiring that all proceedings had in open court in criminal cases be recorded mandatory and, if so, is the failure of the court reporter to record arguments of counsel plain error requiring reversal?

7. Did a conversation between a juror and an FBI agent, who had been seated at counsel table with the prosecution and who had testified against petitioner, during a recess in petitioner's trial constitute official intrusion into the privacy of the jury requiring reversal?

CONSTITUTIONAL PROVISIONS INVOLVED

Fifth Amendment:

"* * * nor shall (any person) be compelled in a criminal case to be a witness against himself * * *."

Sixth Amendment:

"In all criminal prosecutions, the accused shall enjoy the right * * * to be informed of the nature and cause of the accusation * * *."

STATUTORY PROVISIONS INVOLVED

Federal Rules of Criminal Procedure, 18 United States Code

"Rule 7(c). Nature and Contents. The indictment * * * shall be a plain, concise and definite written statement of the essential facts constituting the offense charged."

"Rule 14. Relief from Prejudicial Joinder. If it appears that a defendant * * * is prejudiced by a joinder * * * of defendants in an indictment * * *, the court may * * * grant a severance of defendants * * *."

"Rule 52(b). Plain Error. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court."

Title 18, United States Code, Section 912:

"Whoever falsely assumes or pretends to be an officer or employee acting under the authority of the United States or any department, agency or officer thereof, and acts as such, or in such pretended character demands or obtains any money, paper, document, or thing of value, shall be fined not more than $1,000 or imprisoned not more than three years, or both."

Title 18, United States Code, Section 3481:

"In trial of all persons charged with the commission of offenses against the United States * * *, the person charged shall, at his own request, be a competent witness. His failure to make such request shall not create any presumption against him."

Title 28, United States Code, Section 753:

"(b) One of the reporters for each such court shall * * * record verbatim by shorthand or by mechanical means: (1) all proceedings in criminal cases had in open court * * *."

STATEMENT OF THE CASE

Petitioner and a co-defendant were tried on an indictment (R. Vol. I, p. 13) which charged:

> "That on or about November 2, 1966, at Charlotte, within the Western District of North Carolina, GERALD RONALD GUTHRIE and ALBERT OTIS HADEN did falsely pretend to be officers and employees of the United States acting under the authority thereof, that is, Federal bank examiners, and did falsely take upon themselves to act as such, in violation of 18 U.S.C. 912."

Both petitioner and his co-defendant made motions for severances which motions were denied by the Court (R. Vol. I, pp. 8-12), whereupon, petitioner and his co-defendant were arraigned and a jury was empanelled.

The government introduced testimony by several witnesses that petitioner's co-defendant had contacted a Mr. Fred Stegall and represented himself to be a federal bank examiner and that at some later date the petitioner had represented himself to be a federal bank examiner to either Mr. Stegall or his wife.

Petitioner did not testify nor did he offer any evidence in his behalf. Petitioner's co-defendant took the stand and testified that he had represented himself as a "state" rather than a "federal" bank examiner. To impress the jury with his candor and credibility, petitioner's co-de-

fendant admitted a life of crime and imprisonment as a professional "con-man."

The court reporter did not record the closing arguments of counsel (R. Vol. I, pp. 193-194).

After being instructed by the Court, the jury returned a verdict of guilty as to both petitioner and his co-defendant (R. Vol. I, p. 220). Sentence was then imposed and petitioner gave notice of appeal (R. Vol. I, p. 231, R. Vol. II, p. 2) to the United States Court of Appeals for the Fourth Circuit.

On appeal, petitioner attacked the sufficiency of the indictment, the sufficiency of the Court's instructions to the jury, the refusal of the Court to grant a severance for trial, and the prejudicial comment by the Court on petitioner's failure to testify during its instructions to the jury. The Court of Appeals affirmed in an opinion entered on December 5, 1967 (387 F. 2d 569, R. Vol. II, pp. 13-22, Appendix A) holding that "intent to defraud" was not an element of the offense charged and finding the remaining contentions to be without merit.

During the pendency of the appeal, it was brought to the attention of the Court that an FBI agent who had been seated at counsel table with the prosecution and who had testified against petitioner, had engaged in conversation with a juror during a recess in the proceedings. The case was remanded to the District Court with directions that a hearing be held concerning the circumstances and content of such communication. In a supplemental opinion and judgment entered on March 4, 1968 (R. Vol. II, pp. 28-31, Appendix B), the Court of Appeals accepted the finding of the District Court that the conversation was harmless, and petitioner's conviction was affirmed.

REASONS FOR GRANTING THE WRIT

I

An Indictment Which Fails to Allege an "Intent to Defraud" in Charging an Offense under 18 United States Code, Section 912 Is Fatally Defective.

Section 912 of Title 18 of the United States Code, provides:

> "Whoever falsely assumes or pretends to be an officer or employee acting under the authority of the United States or any department, agency or officer thereof, and [1]* acts as such, or [2]* in such pretended character demands or obtains any money, paper, document or thing of value, shall be fined not more than $1,000 or imprisoned not more than three years or both."

The indictment in this case charged:

> "That on or about November 2, 1966, at Charlotte, within the Western District of North Carolina, GERALD RONALD GUTHRIE and ALBERT OTIS HADEN did falsely pretend to be officers and employees of the United States acting under the authority thereof, that is, Federal bank examiners, and did falsely take upon themselves to act as such, in violation of 18 U.S.C. 912."

As against petitioner's contention that the indictment was fatally defective in that it failed to allege an "intent to defraud", the Court of Appeals specifically held that such intent was not an essential element of the offense charged, stating that this conclusion was compelled by the Reviser's note to Section 912. The Reviser's note is as follows:

> "The words 'with the intent to defraud the United States or any person', contained in said section 76 of

*Brackets and identifying numerals added.

Title 18, U.S.C., 1940 ed., were omitted as meaningless in view of United States v. Lapowitch (Lepowitch), 63 S. Ct. 914."

The dilemma thus presented is identical to that in *Honea* v. *United States*, 5th Cir. 1965, 344 F. 2d 798, wherein the question presented was the sufficiency of an indictment charging an offense under part (2) of section 912, where the indictment failed to include an allegation of "intent to defraud." The conclusion reached by the Fifth Circuit is in direct conflict to the opinion here sought to be reviewed.

The decision of this Court in *United States* v. *Lepowitch*, 318 U.S. 702, 87 L. Ed. 1091, 63 S. Ct. 914, held simply that an "intent to defraud" as applied to an offense under part (1) of the statute could be construed to mean an intent to change the course of another's conduct. *Lepowitch* merely defined the meaning of "intent to defraud" as an element of an offense under part (1) of the statute. See *Honea* v. *United States*, supra, wherein it was recognized that the Reviser's note was a gloss and that Congress intended no change in the essential elements of the offense of false personation when it enacted the present Code. Nor does a scrutinous perusal of *Lepowitch* reveal any suggestion that an elimination of "intent to defraud" was indicated or intended.

If the language of the Reviser is construed to mean that, because of the decision in *Lepowitch*, the Revision was eliminating "intent to defraud" in the statute without effecting any change in the substantive law, such construction would be much more in keeping with the intent of the committee responsible for the revisions as indicated by the legislative history thereof. If, on the other hand, the note is construed to compel elimination of "intent to de-

fraud" as an element of an offense under part (1) thereof, as was held by the Fourth Circuit, such construction is then in direct conflict with the decision of this Court in *Morissette* v. *United States*, 342 U.S. 246, 96 L. Ed. 288, 72 S. Ct. 240, wherein it was held that "mere omission from Section 641 of any mention of intent will not be construed as eliminating that element from the crimes denounced."

The Court of Appeals for the District of Columbia has held that false personation is a common law offense and that, as such, an "intent" is an essential element thereof despite Congressional silence on the subject. *Levine* v. *United States*, D.C. Cir. 1958, 261 F. 2d 747. A similar conclusion was reached by the Court of Appeals for the Fifth Circuit in *Honea* v. *United States*, supra. In *Honea*, the Court attempted to reconcile the omission of "intent" from the statute, with the law applicable to common law offenses, The Court referred to the omission as having occurred in "a structural recodification."

In *Honea*, the Fifth Circuit also referred to the approved forms for indictments under section 912 (See Forms 8 and 9, Federal Rules of Criminal Procedure, Appendix of Forms) as indicative of what the law requires. Though raised in brief, this point was not considered by the Fourth Circuit in its opinion.

The Fourth Circuit, in the opinion here sought to be reviewed, sought to distinguish *Honea* on the grounds that it involved an indictment under part (2) of section 912, whereas the instant case involved an indictment under part (1) of the statute. As to any conflict, the Fourth Circuit declined to follow the Fifth Circuit.

It is submitted that the opinion of the Court of Appeals for the Fourth Circuit here sought to be reviewed is in di-

rect conflict with the intent of Congress in enacting Title 18, United States Code, Section 912; applicable decisions of this Court on the same matter, i.e. *United States* v. *Lepowitch*, supra, and *Morissette* v. *United States*, supra; and applicable decisions of the Fifth Circuit on the same matter, i.e. *Honea* v. *United States*, supra.

It is further submitted that the indictment in this case is fatally defective in that it fails to allege an essential element of the offense sought to be charged. See *Russell* v. *United States*, 369 U.S. 749, 8 L. Ed. 2d 240, 82 S. Ct. 1038, and cases cited therein. See also Rule 7(c), Federal Rules of Criminal Procedure.

II

The Failure of the Court to Instruct the Jury That "Intent to Defraud" Was an Essential Element of an Offense under 18 United States Code, Section 912, Was Plain Error Requiring Reversal.

If petitioner is correct in his contention that an "intent to defraud" is an essential element of an offense under 18 United States Code, Section 912, then, irrespective of the sufficiency of the indictment, his conviction is due to be reversed inasmuch as the Court failed to instruct the jury as to this element of the offense charged.

It is well-settled that a failure to instruct the jury as to the essential elements of the offense charged is plain error under Rule 52(b) of the Federal Rules of Criminal Procedure.

> "Where intent of the accused is an ingredient of the crime charged, its existence is a question of fact which must be submitted to the jury." *Morissette* v. *United States*, supra.

III

The Denial of Petitioner's Motion for a Severance Was Plain Error Requiring Reversal.

Petitioner and his co-defendant were charged with violating 18 United States Code, Section 912, in a single count indictment (R. Vol. I, p. 13). The evidence showed that on October 12, 1966, petitioner's co-defendant had a conversation with Mr. Fred Stegall wherein he allegedly represented himself to be a Federal bank examiner (R. Vol. I, pp. 32 et seq.). Mr. Stegall testified that petitioner made the same representations to him on November 2, 1966 (R. Vol. I, pp. 52-56).

A review of the proceedings at trial clearly shows that the case was tried as a conspiracy without a conspiracy having been alleged. Though the record is full of instructions regarding the competency of the testimony as to one or the other of the defendants, there was no way that the jury could help but be prejudiced. This is especially true in light of the reference by the Court in its instructions to "they" in stating the contentions of the government (R. Vol. I, p. 209).

The prejudice accruing to petitioner was aggravated and emphasized when his co-defendant took the stand and advanced a defense characterized by the Court of Appeals as "brazen." It was from the lips of petitioner's co-defendant that the most incriminating testimony as to petitioner was elicited. Furthermore, a different set of facts was necessary to sustain the burden of proof as to each of them. The only relationship between petitioner and his co-defendant was the conspiracy which, though not alleged, was proven at trial.

It is submitted that under such circumstances, a denial of a motion for a severance is prejudicial per se and re-

quires reversal as a matter of law. See Rules 14 and 52(b) of the Federal Rules of Criminal Procedure. The writ should be granted to condemn such a departure from the accepted and usual course of judicial proceedings. See *Schaffer* v. *United States*, 362 U.S. 511, 4 L. Ed. 2d 921, 80 S. Ct. 945.

IV

Petitioner's Fifth Amendment Rights Were Abridged When the Court, in Charging the Jury, Attempted to State the Contentions of Petitioner, Who Did Not Testify.

The trial court, after instructing the jury as to the contentions of the Government and of petitioner's co-defendant, made the following statement to the jury:

> "Now, under a recent decision of the United States Court, the Court of Appeals, when one does not go upon the witness stand and give evidence in his own behalf, then you are not permitted to state the contentions of that individual who is up for trial and does not testify, other than to instruct the jury that he has the right to and does rely upon the presumption of innocence, the fact that he can only be convicted if he is when a jury is satisfied of his guilt and beyond a reasonable doubt, and that he has every inherent right to rely upon his plea of not guilty. But in any event, assuming that he would accept the statements of Mr. Haden, his co-defendant, he says and contends that * * *." (R. Vol. I, p. 214).

Petitioner contends that such an instruction constitutes impermissible comment by the Court upon the exercise, by petitioner, of a right guaranteed to him by the Fifth Amendment and Title 28, United States Code, Section 3481. See *Griffin* v. *California*, 380 U.S. 609, 14 L. Ed. 2d 106, 85 S. Ct. 1229.

That such comment was plainly prejudicial has been recognized by the Court of Appeals for the Fourth Circuit in prior decisions which were apparently ignored in the Court's opinion of December 4, 1967 (Appendix A).

In *United States* v. *Weir*, 4th Cir. 1965, 348 F. 2d 453, the Court of Appeals for the Fourth Circuit held:

> "We think it plainly prejudicial, when the defendant has seen fit not to testify, for the Court's charge to undertake to present, as in this case, speculatively and perhaps even derisively defenses which the defendant has not tendered. Compare *United States* v. *Harris*, 346 F. 2d 182 (4th Cir. 1965). Such a charge fatally impairs the fairness of a trial. The error cannot be condoned as harmless for there is no way of measuring the degree of harm."

In ignoring its prior decisions on the subject, the Court of Appeals for the Fourth Circuit has sanctioned such a departure from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision and rendered a decision in conflict with the applicable decisions of this Court.

V

The Giving of an Instruction Which Would Authorize a Conviction of an Offense Not Charged in the Indictment Is Plain Error.

Title 18, United States Code, Section 912, contains two separate offenses. *United States* v. *Barnow*, 239 U.S. 74, 60 L. Ed. 155, 36 S. Ct. 19; *United States* v. *Lepowitch*; supra; *Honea* v. *United States*, supra. Despite its recognition of the two offenses proscribed by Section 912 (See Appendix A, note 1), the Court of Appeals for the Fourth Circuit found no merit in petitioner's contention that the trial court erred in charging the jury as to both offenses.

The Court, in charging the jury, read the entire statute verbatim and then paraphrased the statute as to both of the offenses proscribed therein (R. Vol. I, pp. 203-204).

It has long been recognized that instructions which would tend to authorize a conviction if the evidence established a violation of the law, though not charged in the indictment, are prejudicial error requiring reversal under Rule 52(b) of the Federal Rules of Criminal Procedure. *Einziger* v. *United States*, 2nd Cir. 1921, 276 Fed. 905.

It is submitted that the writ should be granted in order to settle the apparent conflict between the opinion of the Fourth Circuit in this case and applicable decisions of the Court of Appeals for the Second Circuit.

VI

The Requirement of 28 United States Code, Section 753(b)(1), That All Proceedings Had in Open Court in Criminal Cases Be Recorded, Is Mandatory and the Failure of the Court Reporter to Record Arguments of Counsel Is Plain Error Requiring Reversal.

Congress, in enacting 28 United States Code, Section 753(b)(1), bestowed upon a defendant in a criminal case, an unconditional and unqualified right to insist upon a full and complete transcript of all proceedings had in open court. The requirements of this statute have been held to be mandatory. *Stephens* v. *United States*, 5th Cir. 1961, 289 F. 2d 308; *Fowler* v. *United States*, 5th Cir. 1962, 310 F. 2d 67; *Parrott* v. *United States*, 10th Cir. 1963, 314 F. 2d 46.

See also *Poole* v. *United States*, D.C. Cir. 1957, 250 F. 2d 396.

The Court of Appeals for the Fifth Circuit held, in *Stephens* v. *United States*, supra, that Section 753(b)(1)

was mandatory in its requirements and that the failure of the Court to observe the terms of the statute necessitated reversal inasmuch as the appellate Court was unable, in the absence of a full and complete transcript, to adjudicate that there was no showing that any errors which might have been reflected by the transcript were harmless. In *Fowler* v. *United States,* supra, the Fifth Circuit specifically condemned the local practice of recording closing arguments only on request of counsel. The practice thus condemned was but a slight variation of the practice tacitly approved by the Fourth Circuit in the opinion here sought to be reviewed.

Both of these Fifth Circuit decisions have been distinguished and interpreted by later decisions as holding that the burden of showing prejudice is upon the defendant who claims error in a failure to comply with the statute.

That the failure to record arguments of counsel to the jury is error is apparent inasmuch as Congress has legislated unequivocally upon the subject. As to the effect of such error, there is a hopeless conflict in the applicable decisions of the various Courts of Appeals on the same subject, as well as within the various circuits.

It is submitted that when there has been error in the failure to record closing arguments of counsel, the burden should be cast upon the government to show beyond a reasonable doubt, that such error was without prejudice to a defendant. In other words, the test to be applied in determining whether a defendant was prejudiced by a failure to comply with 28 United States Code, Section 753(b)(1), is the test stated by this Court in *Chapman* v. *California,* 386 U.S. 18, 17 L. Ed. 2d 705, 87 S. Ct. 824.

To cast upon a defendant the burden of overcoming the presumption that such error is harmless is contrary

to the decisions of this Court. The record reveals that closing arguments of counsel were not recorded (R. Vol. I, pp. 193-194). Petitioner did not, nor was he given an opportunity to, waive his right to insist upon a complete transcript of the proceedings at his trial.

Petitioner's counsel is not able to determine whether or not the error was without prejudice in this case. Certainly this Court cannot declare a belief that it was harmless beyond a reasonable doubt.

The writ should be granted in order to determine the effect of a failure to comply with the requirements of 28 United States Code, Section 753(b)(1) and whether such error necessitates reversal under Rule 52(b) of the Federal Rules of Criminal Procedure. The writ should be granted in order to place the burden of proof in such circumstances. Is the burden upon the defendant to show that he was prejudiced by the failure to comply with the statute, or is the burden upon the Government to show that the error was harmless beyond a reasonable doubt? See *Chapman* v. *California*, supra.

VII

The Conversation During a Recess in Petitioner's Trial Between a Juror and an FBI Agent Who Had Been Seated at Counsel Table with the Prosecution and Who Had Testified Against Petitioner, Constituted Official Intrusion into the Privacy of the Jury.

While petitioner's case was on appeal, it was brought to the attention of the Court that, during petitioner's trial, an FBI agent was observed conversing with a juror. During the trial, this FBI agent had been seated at counsel table with the District Attorney (R. Vol. I, pp. 30-31). The agent also testified against petitioner (R. Vol. I, pp. 106-133).

The Court of Appeals remanded the case to the District Court with directions to hold a hearing as to whether the

conversation was harmless (Appendix A). A hearing was had and the Court of Appeals accepted the finding of the District Court that the conversation was innocent, unrelated to the case and in no way prejudicial (R. Vol. II, pp. 28-31, Appendix B).

The decision thus rendered is in direct conflict with the decisions of this Court in *Remmer* v. *United States*, 347 U.S. 227, 98 L. Ed. 654, 74 S. Ct. 450; 350 U.S. 377, 100 L. Ed. 435, 76 S. Ct. 425 and *Gold* v. *United States*, 352 U.S. 985, 1 L. Ed. 2d 360, 77 S. Ct. 378.

> "In a criminal case, any private communication, contact or tampering, directly or indirectly, with a juror during a trial about the matters pending before the jury is, for obvious reasons, deemed presumptively prejudicial * * *." *Remmer* v. *United States*, supra.

The fact that the intrusion was unintentional does not remove the prejudicial effect of the intrusion. *Gold* v. *United States*, supra.

The conversation in this case was between a juror empanelled to determine petitioner's guilt or innocence and the FBI agent who had arrested petitioner and who had investigated and presented the case against him. The establishment of an unwarranted and improper rapport between this FBI agent and a juror is sufficient prejudice to necessitate reversal under the applicable decisions of this Court.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for writ of certiorari should be granted.

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